NO. 02-10924

ORIGINAL

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

FRANKIE LEVI COLE,
Petitioner,

-against-

FRANK X. HOPKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

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PREPARED AND PRESENTED BY:

Frankie Levi Cole, pro se
P.O. BOX 900
Tecumseh, Nebraska 68450

63 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the specific wording in the U.S. District Court Judge's grant of certificate of appealability on the question of whether fraudulent intent is an element of the criminal offense, Theft By Receiving Stolen Property (TBRSP) as defined at Neb.Rev. Stat. § 28-517 (Reissue 1995), represented a debatable issue under federal law adequate to satisfy the requirement at 28 U.S.C.A. § 2253 as the U.S. District Court Judge intended. And if not, whether Petitioner was entitled to some different equitable remedy instead of the dismissal action imposed by the Eighth Circuit Court of Appeals below.

2. Whether due process of law was violated in this case where a decision on the merits, and, pro se motion to expand certificate of appealability were denied by the Eighth Circuit Court of Appeals while it acknowledged the existence of a meritorious constitutional claim which properly was included within Petitioner's pro se motion to expand certificate of appealability filed after court appointed counsel had refused to file a motion to expand on Petitioner's behalf. And if so, what is the appropriate remedy for such federal appellate court due process violations of a state court federal habeas petitioner's rights when caused by this kind of incompetent act or omission by court appointed appellant counsel.

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DECISIONS BELOW

The decision of the Eighth Circuit Court of Appeals is unreported under the case, Cole v. Hopkins, No. 02-1971. A copy of this decision is attached at App. A.1.

The decision by the U.S. District Court, District of Nebraska, is also unreported as case, Cole v. Hopkins, 4:99CV3327. A copy is attached to this petition at App. C.1.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on January 22, 2003. Petition for Rehearing or for Rehearing En Banc was filed on February 5, 2003 (App. A.6); and, rehearing was denied on February 21, 2003 (App. A.6).

Jurisdiction was conferred upon the court of first instance by 28 U.S.C.A. § 2254; and, upon this Court by 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment V to the Constitution of the United States which provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .";

and, U.S. Constitutional Amendment IV which makes the Fifth Amendment binding on the States and adds the additional express provision that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

State law statutory provisions essential to the disposition of this petition include Neb.Rev.Stat. § 28-517 (Reissue 1995) which provides:

> "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, **unless the property is received, retained, or disposed with intention to restore it to the owner.**" (emphasis added).

and, § 28-509, ibid., which provides in pertinent part:

> Terms . . . as used in sections 28-509 to 28-518, unless the context otherwise requires:
>
> (1) Deprive shall mean:
>
> (a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or
>
> (b) To dispose of the property of another so as to create a substantial risk that the owner will not recover it in the condition it was when the actor obtained it;

and, § 29-1604, ibid., which provides:

> **Information; procedure; law applicable.** The provisions of the criminal code in relation to indictments, and all other provisions of law, applying to prosecutions upon indictments to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments or the execution of any sentence, and to all other proceedings in cases of indictments, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as nearly as may be, apply to informations, and all prosecutions and proceedings thereon.

STATEMENT OF THE CASE

Petitioner in this case is a state court defendant seeking writ of certiorari to the Eighth circuit Court of Appeals decision (App. A.1-A.5) affirming the U.S. District Court denial of an evidentiary hearing and writ of habeas corpus sought under 28 U.S.C. 2254 (App. C.1) after an evidentiary hearing had also been denied in the state court (claim 4, App. H.7) in this case where Petitioner has been sentenced to a term of 30 years imprisonment; 20 years of which must be completed without possibility for parole under Nebraska's habitual criminal statute, Neb.Rev.Stat. § 29-2221 (Reissue 1995). See lines 3 and 4 at App. H.1.

Initially, the U.S. District Court Judge dismissed Petitioner's habeas claims 1, 6, 7, 9, and 11 based solely upon legal reasoning from which he concluded that fraudulent intent is not an essential element of TBRSP under § 28-517 (App. C.6-16). But then upon his consideration of the arguments Petitioner presented in a Notice of Appeal and Request for Certificate of Appealability citing the Model Penal Code along with Nebraska Supreme Court case precedent contrary to his holding on the matter (pp. E.3-5), the District Court Judge granted Petitioner's request for certificate of appealability in order to have the Eighth Circuit Court of Appeals decide the question of whether fraudulent intent is in fact an essential element of TBRSP under § 28-517 (App. D.25-26) (leaving the inference that claims 1, 6, 7, 9, and 11 would each be revived upon a finding in the affirmative).

However, when rendering its decision on appeal, the Eighth Circuit Court of Appeals overlooked the U.S. District Court Judge's reasoning as it connected the fraudulent intent issue to claims 1,

6, 7, 9, and 11. Instead, by merely concluding that the interpretation of a state criminal statute is a matter left solely to the discretion of each individual State (App. A.3), the Court of Appeals (citing the fact that court appointed appellant counsel had failed to submit a motion to expand certificate of appealability) affirmed the U.S. District Court denial of an evidentiary hearing without affording Petitioner benefit of a review on the merits of the U.S. District Court decision (App. A.4-5). The Court of Appeals erroneously held that neither Petitioner nor the State of Nebraska had cited to a "Nebraska case stating the precise elements of theft by receiving stolen property" (App. A.4); whereas, appellant counsel had cited State v. Sardeson, 231 Neb. 586, 594, 437 N.W.2d 473, 480 (1989) in his brief (App. J.2-3) where the Nebraska Supreme Court held that under § 28-517 a person commits theft:

> "by receiving stolen property only if one 'receives, retains, or disposes' of, in short, posseses, stolen movable property of another with the proscribed knowledge **and intent**" (emphasis added).

Principal among the federal claims presented in this habeas action, Petitioner alleged as claims 1 (App. H.6) and 11 (App. H.16-17) that the State neither alleged nor proved the element of fraudulent intent as encoded within the exception clause of Nebraska's TBRSP statute, § 28-517, supra. And the U.S. District Court Judge (App. C.6) acknowledged the constitutional dimensions of Petitioner's claims 1 and 11 which alleged these causes of action. The Eighth Circuit Court of Appeals (App. A.3) also expressed agreement that these allegations are adequate to state causes of action for which relief may be granted under § 2254.

Further, Petitioner factually alleged in the instant case claims 6 and 7 (App. H.8-12) that both trial and direct appeal

counsel were ineffective in part because of acts or omissions committed by them as a result of their failure to recognize that fraudulent intent is an essential element of § 28-517. In claim 9 (App. H.15-16) Petitioner alleged that the State violated due process when it refused to issue the jury instruction required to properly advise the jury at trial of the standard of proof necessary to prove fraudulent intent under § 28-517 and prescribed at § 28-509, supra.

Prior to this order of affirmance, the Court of Appeals had also denied Petitioner's motion for substitute counsel (App. F.1) filed because there existed a conflict of interest inherent in the circumstances surrounding court appointed appellant counsel, Gooch's, assignment to the case (App. F.2-5). No hearing of any kind was ever held to review the merits of this conflict of interest allegation.

In the Petition for Rehearing or for Rehearing En Banc, Petitioner again cited the Model Penal Code and specifically referenced Nebraska case law including Sardeson, supra, supporting the fact that fraudulent intent is an element of TBRSP as defined at § 28-517 (App. B.6-9). Condensed and restated, Petitioner asserted the following immediately relevant bases in support of a rehearing: The Eighth Circuit Court of Appeals erred (1) by refusing to grant Appellant's motion to expand certificate of appealability; (2) by failing to find that fraudulent intent is an element of Nebraska's Theft By Receiving Stolen Property statute; and (3) by denying Appellant's motion for appointment of substitute counsel. (App. B.i). This motion for rehearing or for rehearing en banc was denied on 02-21-03. (App. A.6).

REASONS FOR GRANTING CERTIORARI

A. Conflicts with decisions of this Court and other Circuits.

1. There is a split among the Circuits and this Court's opinions on the matter of whether the statutory wording of § 28-517 requires a finding of fraudulent intent which must be alleged and proved in every case; and also regarding the matter of when these type state law based questions may be heard in a federal habeas corpus proceeding.

The Nebraska Supreme Court found that the "unless" clause in § 28-517 requires the state to prove intent. Sardeson, supra, 231 Neb. at 594, 437 N.W.2d at 480 The Model Penal Code (MPC) defines this as an "intent to deprive" or "fraudulent intent." See MPC § 223.6, page 237, 1980, cited verbatim in Appellant Brief (App. I.16). Case decisions by this Court requiring exception clauses of the type in § 28-517 to be alleged and proved include U.S. v. Vuitch, 91 S.Ct. 1294, 1298, 402 U.S. 62, 70 (1971):

> It is a general rule to the interpretation of criminal statutes that when an exception is incorporated in the enacting clause of a statute, the burden is on the prosecution to plead and prove that the defendant is not within the exception.

Whereas, cases cited by the Eighth Circuit or the U.S. District Court as not requiring the State to allege and prove an exception clause of the type in § 28-517 include State v. Lopez, 787 P.2d 1261, 1264 (N.M.App. 1990). (App. A.4, and App. C.11).

The Eighth Circuit Court of Appeals decision refusing to decide or address how the instant case Petitioner's federal claims are affected by the fraudulent intent question as certified to it by the U.S. District Court Judge (simply because that court perceived no clearly worded Nebraska Supreme Court decision on the matter)

conflicts with other Circuits that have expressly provided in one form or the other that: "When confronted with a state decision that does not provide the basis of its decision, the federal habeas court must determine whether in light of an independent review of the record and the relevant federal law, the state court's resolution of the petitioner's claims was 'contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.'" Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999); Aycox v. Lytle, 196 F.3d 1174, 1177-78 (10th Cir. 1999); Harris v. Stoval, 212 F.3d 940, 943 (6th Cir. 2000); Brown v. Pitcher, 19 Fed.Appx. 154, 156 (6th Cir. 2001).

2. The Court of Appeals decision conflicts with or violates this Court's substantive standard which properly should be applied to the federal government relevant to the instant case habeas appeal proceeding in the same manner prescribing that a state government which "opts to act in field where its action has significant discretionary elements, [] must nonetheless act in accord with dictates of the Constitution and, in particular, in accord with due process clause." Evitts v. Lucey, 105 S.Ct. 830, 838 (1985).

The denial of a review on the merits of the fraudulent intent issue as certified appealable by the U.S. District Court; or, of claims 1, 6, 7, 9, and 11 as requested in Petitioner's pro se motion for rehearing or for rehearing en banc due to the procedural default caused when ineffective court appointed federal habeas appellant counsel failed to submit a motion to expand certificate of appealability violated Petitioner's right to due process of law contrary to the holding in Lucey and Edwards v. Carpenter, 120 S.Ct. 1587, 1591 (2000), that ineffective assistance of counsel excuses a procedural default committed in a postconviction proceeding.

B. Importance of questions presented.

Resolution of this matter is essential to ensure that Nebraska state courts do not continue their practice of convicting defendants of TBRSP under § 28-517 without first adequately charging and then sufficiently proving every element of that offense—including the element of fraudulent intent.

A statement of comprehensive directives needs to be provided by this Court outlining the appropriate remedy for acts or omissions by a federal appellate court (or any habeas appellate counsel who is appointed by such court) that result in a violation of the due process rights of the habeas appellant. I.e., so that the integrity of the principle of providing a full and fair hearing and decision in every case involving an indigent state court habeas petitioner is kept intact as by constitutional imperative it ought to be. Absence of any contemporary guidance on these points has caused the instant case habeas appellant to be denied an evidentiary hearing in both state and federal court and so the right of equal benefit of this Court's procedural standard set in Townsend v. Sain, 83 S.Ct. 745, 757 (1963), guaranteeing that a: "Federal court on habeas must hold evidentiary hearing if applicant did not receive full and fair evidentiary hearing in state court, either at time of trial or in collateral proceeding." Unless certiorari is granted, there is no available remedy left; these constitutional deprivations will become irreparable. Successive postconviction petitions are not allowed on same issues under the State of Nebraska's Postconviction Relief Act. State v. Hunt, 262 Neb. 648, 652-63, 634 N.W.2d 475, 480 (2001); and, an habeas action does not toll the 1-year limitations period set at 28 U.S.C.A § 2244(d)(2) of the AEDPA Duncan v. Walker, 121 S.Ct. 2120, 2129 (2001).

ARGUMENTS IN SUPPORT OF WRIT OF CERTIORARI

I.

THE COURT OF APPEALS ABUSED ITS DISCRETION AND VIOLATED DUE PROCESS OF LAW BY REFUSING TO DECIDE PETITIONER'S FRAUDULENT INTENT QUESTION ON ITS MERITS.

The writ of habeas corpus was denied in this case because of the conflict and confusion between the Circuits, the Model Penal Code's enacting scholars, and this Court's decisions together with the clear import of Nebraska law itself which counsel (in the manner stated at App. B.3 and B.6-9) that "exception clauses" such as that contained in § 28-517 equate to an element of fraudulent intent that must be alleged and proved in every case where TBRSP under § 28-517 is charged.

Further, the absence of a properly defined remedy under federal statutory law or federal case law precedent is preventing Petitioner from securing redress for the acts or omissions by court appointed appellant counsel that were the direct or proximate cause of the denial of a full and fair hearing (due process of law) in the Court of Appeals on this fraudulent intent issue as it relates to Petitioner's constitutional claims 1, 6, 7, 9, and 11. Whereas, absent these habeas appeal related due process violations, Petitioner would have received a hearing on the merits of this habeas appeal. This hearing in turn would have revealed the error by the way an evidentiary hearing and writ of habeas corpus were denied in the U.S. District Court in consideration of the meritorious constitutional claims contained in Petitioner's First Amended Petition for Writ of Habeas Corpus (App. H.6-23) which is the subject of this § 2254 habeas appeal action.

1. Constitutional nature of claims certified appealable via fraudulent intent question.

The U.S. District Court certified the fraudulent intent question as appealable to the Eighth Circuit Court of Appeals because of the pivotal effect this point of law has in determining the merits of claims 1, 6, 7, 9, and 11, as raised in the instant case habeas petition. Particularly, in relation to claims 1 and 11, the U.S District Court Judge eventually began to see that the arbitrary omission of this element of proof under Nebraska law would result in the failure to adequately charge and prove TBRSP under 28-517, and this equates under federal constitutional law to a due process of law violation. This is clear by the way he referenced this fraudulent intent issue first in his order dismissing Petitioner's habeas corpus petition, and then later in his grant of certificate of appealability in relation to it. First in his order of dismissal, the U.S. District Court Judge said:

> "Claims 1, 2, 6, 7, 9 and 11 relate directly to Cole's primary premise in this habeas corpus proceeding, namely, that the offense of theft by receiving stolen property requires the State to charge and to prove beyond a reasonable doubt the element of fraudulent intent. According to Cole, his preliminary hearing, the charging documents issued in the district court, and all proceedings thereafter were fundamentally defective for failure to charge and establish his fraudulent intent." (App. B.6).
>
> :
>
> "Both of Cole's theories are erroneous, i.e., (1) that fraudulent intent is an element of Neb.Rev.Stat. § 28-517 and (2) that the State, in order to obtain a conviction under 28-517, had to charge and prove that Cole lacked intent to return the stolen vehicle to its owner. Claims 1, 2, 6, 7, 9 and 11 of Cole's § 2254 petition will be dismissed with prejudice."

Then subsequently in his order granting certificate of appealability (apparently because he had by then begun to suspect the error

in the bases of his legal reasoning when reaching the above conclusion on this issue) the U.S. District Judge said (referring to claim 1 and 11, App. H.6 and H.16-17, respectively):

> "According to the petitioner, the "exception clause" in section 28-517 functions as the equivalent of intent to deprive another of property, which is an element of other theft crimes in Nebraska such as theft by unlawful taking. The petitioner asserts that the State's failure to charge and prove that he was not within the "exception" for property received with intent to return it to the owner renders his conviction void or voidable.
>
> :
>
> Nevertheless, this is not an issue on which many reported decisions exist. I conclude that the petitioner has sufficiently "demonstrate[d] that reasonable jurists would find the district court's assessment of the constitutional claim debatable. . . ." Slack, 529 U.S. at 484. Therefore, I will issue a certificate of appealability under 28 U.S.C. § 2253 (c)(2) limited to the question whether "fraudulent intent," as characterized by the petitioner, is an essential element of the petitioner's offense of conviction. (App. C.3-4).

The Eighth Circuit Court of Appeals has acknowledged in its 01-22-03 Slip Opinion (App. A.3) that the above referenced assertion that the State of Nebraska failed to allege and prove TBRSP, if proved, states a constitutional claim for which relief may be granted under § 2254 federal habeas corpus provisions. The U.S. District Court Judge had previously acknowledged these claims as having been exhausted and properly raised in this instant habeas corpus action. (App. B.3-4). This is consistent with this Court's prior holdings that establish the denial of a "full and fair hearing in state court itself" as a violation of the Constitution entitling a state court defendant to issuance of the federal writ of habeas corpus:

> By the fourteenth amendment the powers of the states in dealing with crime within their borders are not limited, but no state can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the state, the constitutional requisition is satisfied. 2 Kent, Comm. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. Bank v. Okely, 4 Wheat. 235, 244. The power of the state must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial, and arbitrary. Hurtado v. California, 110 U.S. 516, 535, 4 Sup.Ct. 111, 292.

Caldwell v. State, 11 S.Ct. 224, 137 U.S. 692, 697-698 (U.S.Tex 1891). Cf. Wright v. West, 112 S.Ct. 2482, 2493, 505 U.S. 277, 297-99 (1992), explaining that absence of full and fair hearing itself in the state courts is violation of the Constitution.

Thus, the arbitrary denial of a hearing and decision on the merits of thse claims according to the manner in which the U.S. District Court Judge certified them appealable as they relate to the dispositive fraudulent intent question connected with them (while also denying Petitioner's motion to expand certificate of appealability), represents an abuse of discretion or due process of law violation of the type prohibited in Lucey, supra

2. Merits of claims raised.

Legal arguments presented in Petitioner's "Petition for Rehearing or for Rehearing En Banc" (App. E.6-9) point to exact interpretations found within Nebraska case law (and also the Model Penal code from which § 28-517 was patterned) establishing proof that fraudulent intent is an essential element of § 28-517. Moreover, page 9, ibid., identifies a particular deficiency in pleading which is contrary to express directives handed down by this Court insofar as the fraudulent intent component of § 28-517 fits the definition

for an "exception clause" set out in U.S. v. Cook, 84 U.S. 168, 176-77 (1842). See § 28-517, supra, providing that a person is guilty of TBRSP "unless the property is received, retained, or disposed with purpose to restore it to the owner"; and compare with D.C.Code Ann. § 22-201 cited in Vuitch, supra, 91 S.Ct. at 1294, 402 U.S. at 68, as it contains a similar "unless" provision that was characterized by this Court as an "exception" within its enacting clause which needed to be alleged and proved. 91 S.Ct. at 1298, 402 U.S. at 70.

It is true that the Cook and Vuitch decisions both refer to cases where the "indictment" as distinguished from the "information" system of charging an offense was used; but, cf. Neb.Rev.Stat. § 1604 (Reissue 1995):

> **Information; procedure; law applicable.** The provisions of the criminal code in relation to indictments, and all other provisions of law, applying to prosecutions upon indictments to writs and process therein, and the issuing and service thereof, to motions, pleadings, trials and punishments or the execution of any sentence, and to all other proceedings in cases of indictments, whether in the court of original or appellate jurisdiction, shall in the same manner and to the same extent, as nearly as may be, apply to informations, and all prosecutions and proceedings thereon.

Hence, Petitioner has adequately pleaded a U.S. constitutional claim by alleging at claim 1 (App. H.6) that the State of Nebraska did not meet the Cook or Vuitch case standard of pleading the exception clause in § 28-517 where neither its preliminary hearing complaint nor its arraignment information included facts placing the instant Petitioner outside the exception clause in § 28-517. This and the related claim 11 (App. H.16-17) alleging failure to prove the element of intent represented by the exception clause at § 28-517, supports Petitioner's entitlement to habeas corpus relief in this case.

3. Entitlement to writ of habeas corpus.

In light of the foregoing and under the Delgado, Aycox, Stoval, and Pitcher case standard of review in this case where the Nebraska Supreme Court has failed to issue an opinion to support its summary dismissal, Petitioner has shown entitlement to the writ of habeas corpus in relation to claims 1, 6, 7, 9, and 11. Habeas relief is required where any claim adjudicated in a state court proceeding "resulted in a decision . . . contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 120 S.Ct. 1495, 1504 (U.S.Va. 2000), citing 28 U.S.C.A. 2254(d)(1) (1994 ed., Supp. III).

The failure by the Nebraska Supreme Court to grant relief after the Nebraska State prosecution had failed to allege fraudulent intent (claim 1, App.6) as necessary to prove TBRSP under § 28-517 represents an unreasonable application of federal law as adjudicated by this U.S. Supreme Court in Cook and Yuitch, supra, as they require factual allegations placing the defendant outside the exception clause in § 28-517: Its failure to grant relief based upon the trial court's refusal to issue Petitioner's requested jury instruction requiring a finding of fraudulent intent (claim 9, App. H.15-16), violated due process of law by preventing a full and fair hearing on that issue and thus is an unreasonable application of this Court's holding in Caldwell, supra, 11 S.Ct. 224, 137 U.S. at 694-98, citing Hurtado, supra, 4 S.Ct. at 120-21, 110 U.S. at 535-36; as those cases provide that due process requires a full and fair hearing in the state court. See concurring opinion by Justice O'Connor who was joined by Justice Blackmon and Justice Stevens in Wright, supra, 112 S.Ct. at 2493,

505 U.S. at 297-99; explaining that the absence of a full and fair hearing in the state court is "itself" a violation of the Constitution.

The Nebraska Supreme Court's failure to grant relief based upon Petitioner's ineffective assistance of trial and direct appeal counsel claims against court appointed attorneys who both failed to recognize and take action to protect Petitioner's rights in the above regards (claims 6 and 7, App. H.8-H.12) represents an unreasonable application of this Court's holdings in Strickland v. Washington, 104 S.Ct. 2052, 466 U.S. 668, 80 S.Ed.2d 674 (1984), as explained in Williams v. Taylor, 120 S.Ct. 1495, 1511-12, 529 U.S. 262, 390-91 (U.S.Va. 2000). Therefore, each of the above referenced claims, 1, 6, 7, 9, and 11, adequately state meritorious factual allegations upon which the writ of habeas corpus should be granted.

In light of the foregoing, the Court of Appeals decision finding that the fraudulent intent question as certified appealable to it by the U.S. District Court does not represent a "debatable issue of federal law" is clearly erroneous as a matter of federal law, and it was an abuse of discretion not to render a decision on the merits of this action to decide the fraudulent intent question upon which the merits of each of these constitutional claims depend under the particular facts and circumstances of the instant case situation.

II.

THE COURT OF APPEALS ABUSED ITS DISCRETION BY DENYING PETITIONER'S MOTION TO EXPAND CERTIFICATE OF APPEALABILITY; OR, TO EXCUSE THE PROCEDURAL DEFAULT CAUSED BY COURT APPOINTED APPELLANT COUNSEL SO THAT CLAIMS 1, 6, 7, 9, and 11 COULD BE CONSIDERED BECAUSE OF THE WAY THE U.S. DISTRICT COURT JUDGE ATTACHED THE MERITS OF THOSE CLAIMS TO THE FRAUDULENT INTENT QUESTION CERTIFIED APPEALABLE TO IT.

The Court of Appeals abused its discretion by issuing an order (App. F.1) denying Petitioner's pro se motion to expand certificate of Appealability (App. G) so that a decision could be rendered on claims 1, 6, 7, 9, and 11 for the reasons stated at App. G.4-G13; or, to excuse the procedural default caused when court appointed habeas appellant counsel failed to move to expand certificate of appealability on his own in relation to those claims as Petitioner requested the Court of Appeals to do in a motion for rehearing or for rehearing en banc (App. C).

Federal courts must conform to Fifth Amendment Due Process Clause requirements while adjudicating discretionary habeas corpus appeal proceedings no less than is required of state courts as prescribed in Lucey, supra, because of the effect the fifth Amendment has on the States via the Fourteenth Amendment. Due process of law first and foremost guarantees the right to a full and fair hearing whether the proceeding is conducted in state or federal court. See Wright, supra, 112 S.Ct. at 2493-94, 505 U.S. at 298-99. Consequently, just as it would be reversible error for the federal appellate court to deny a federal habeas appellant a full and fair hearing (due process of law) because of its own erroneous acts or omissions; similarly, it violates due process of law whenever a full and fair hearing is denied a habeas appellant on account of the acts or omissions of any officer of the federal habeas appellate court.

An attorney practicing in a federal court is recognized as an officer of the court. Wilder v. GL Bus Lines, 253 F.3d 126, 130 (2nd Cir. 2001); and, Petitioner's right to a full and fair hearing and relief on the constitutional claims raised in the instant case situation ultimately were procedurally defaulted when court appointed counsel refused to submit a motion to expand certificate of appealability although an expanded certificate was warranted by the facts and circumstances of this case. This matter was addressed to the Eighth Circuit Court of Appeals in Petitioner's request for rehearing or for rehearing en banc (App. B.10); however, relief was denied (App. A.6) although this type due process violation and the fact of its sufficiency to excuse a procedural default in a postconviction action has been thoroughly expressed by the Eighth Circuit Court of Appeals as it said:

> Lest there be any doubt, we hold that ineffective assistance of post-conviction counsel can be "cause" for purposes of lifting a procedural bar. Otherwise, petitioner would be stuck with whatever his post-conviction lawyer had done, however incompetent. It is certainly true that the ineffectiveness of post-conviction counsel is not, in and of itself, a ground for habeas relief. That, however, is not the same thing as saying it cannot be cause to excuse a procedural default. The procedural default in question, of course, must be (as it is here) one that occurred in the post-conviction proceeding.

Simmons v. Lockhart, 915 F.3d 372, 376 (8th Cir. 1990). Cf. Edwards v. Carpenter, 120 S.Ct. 1587, 1591, 529 U.S. 446, 451 (2000) as it echoes these same postconviction default standards.

As clearly as this remedy for procedural defaults caused by ineffective attorneys in a state court postconviction proceeding is identified in Lockhart and Carpenter, relief for this identical constitutional deprivation was denied when requested in Petitioner's petition for rehearing or for rehearing en banc.

The federal writ of habeas corpus is an indispensable element of the constitutional protections which must remain open to state court defendants in order to vindicate the right to due process of law at both the state and federal postconviction court levels. Therefore, it is necessary for this Court to define an appropriate avenue of redress for this type constitutional rights abuse when it occurs in a federal habeas corpus appeal (postconviction) proceeding since no such directive clearly exists at the present time under federal statutory or federal case law precedent out of this court or uniformly among the Circuits. The abuse of discretion by the Eighth Circuit Court of Appeals below when it refused to grant Petitioner's motion to expand certificate of appealability, or to excuse the procedural default when court appointed federal habeas appellant counsel failed to timely move for a motion to expand certificate of appealability, was the direct result of the existence of this legal void

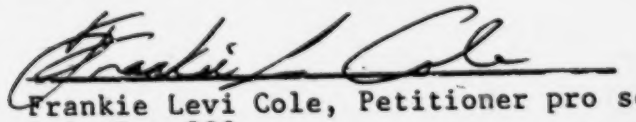
CONCLUSION

Petitioner was denied a full and fair hearing (due process of law) in the instant case habeas appeal because of the conflict between this Court's decisions and the Model Penal Code enacting scholars' interpretation of the statutory wording present in the exception clause of § 28-517, supra, together with the import of Nebraska Supreme Court case holdings which identify the exception clause in § 28-517 as representing an element of fruadulent intent that must be alleged and proved in every case; and, the decision reached in other Circuits which have obscured this clear U.S. Constitutional Law based pleading and criminal prosecution requirement.

Thus, the writ of certiorari is necessary to settle the questions of (1) to what degree a federal habeas court should apply its independent legal reasoning to interpret state criminal statutes that have not bee expressly interpreted by the State's highest court adequate to settle a U.S. Constitutional claim raised by a state court habeas appellant; and (2) to define or prescribe the appropriate remedy for due process of law violations which occur on account of acts or omissions by a court appointed federal habeas appellant attorney representing an indigent state court habeas appellant who would otherwise be entitled to a favorable ruling in a federal habeas appeal action such as was the case here.

WHEREFORE, Petitioner requests that writ of certiorari be granted.

Respectfully submitted,



Frankie Levi Cole, Petitioner pro se
P.O. Box 900
Tecumseh, NE 68450

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-1971

Frankie Levi Cole,	*	
	*	
Appellant,	*	Appeal from the United States
	*	District Court for the District
v.	*	of Nebraska.
	*	
Frank X. Hopkins,	*	[UNPUBLISHED]
	*	
Appellee.	*	

Submitted: January 14, 2003

Filed: January 22, 2003

Before LOKEN, FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Frankie Levi Cole petitions this Court for habeas relief from his conviction and sentence for theft by receiving stolen property in Omaha, Nebraska. Cole was observed driving in a stolen Ford Thunderbird with the lights off. Police pursued Cole, who fled first in the car, then on foot, but was apprehended. Cole was tried, found guilty by a jury, and the Nebraska Court of Appeals affirmed his conviction. Cole unsuccessfully filed two pro se petitions for postconviction relief in State court. The Nebraska Court of Appeals summarily affirmed the lower court's denial of relief in each case.

Cole then petitioned the federal district court for habeas relief on many claims. The district court* denied the petition but granted a certificate of appealability on one narrow issue: whether fraudulent intent is a material element of the offense of theft by receiving stolen property.

Nebraska law defines theft by receiving stolen property as follows:

> A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner.

Neb. Rev. Stat. Ann. § 28-517 (Michie 1995). Cole argues the State must prove as an element of the offense that Cole did not intend to restore the car to its owner, and the State failed to do so at trial. Cole raised this issue before the state court in pro se filings but Cole's counsel did not include this issue in any filings presented to the state courts. The State argues this is a question of Nebraska state law, and federal courts reviewing habeas petitions are limited to deciding whether the conviction violated clearly established Federal law. The State also contends that Cole did not raise a federal claim about the element of the offense in state court so the claim is procedurally defaulted.

Habeas review is a limited inquiry. We may grant habeas relief only when the decision of a state court is contrary to or involves an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d) (2000). "A state court decision is 'contrary to' clearly established federal law if the rule applied by the state court directly contradicts Supreme Court precedent or if the state court has reached a result opposite to a result reached by the Supreme Court on 'materially indistinguishable'

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*The Honorable Richard G. Kopf, Chief Judge, United States District Court for the District of Nebraska.

facts." Johnston v. Luebbers, 288 F.3d 1048, 1051 (8th Cir. 2002) (quoting Williams v. Taylor, 529 U.S. 362, 405 (2000) (O'Connor, J., concurring)). We do not review questions of state law in habeas proceedings. Lee v. Gammon, 222 F.3d 441, 443 (8th Cir. 2000); Woods v. Solem, 891 F.2d 196, 199 (8th Cir. 1989).

To prevail, Cole cannot argue only that Nebraska law requires proof of fraudulent intent as a material element of theft by receiving stolen property, but also must argue that the state prosecutor's failure to prove this material element denied Cole due process. Woods, 891 F.2d at 199. The State argues that this claim is procedurally defaulted because the fraudulent intent issue was raised pro se, not by counsel, and because it was not raised in proper due process trappings. We disagree. The record indicates that Cole has been advocating this fraudulent element of the offense claim since before his trial. Cole repeatedly requested appointment of counsel who would argue his theory of the case. Although many attorneys were appointed, and excused, none raised Cole's claim. When counsel refused to raise it on appeal, Cole submitted supplemental pro se briefs. Cole has done all he can to place the issue before the courts. Clemmons v. Delo, 124 F.3d 944, 948 (8th Cir. 1997).

Procedural problems aside, we cannot review Cole's claim because, at its root, the claim presents a question of state law. Repackaging the claim in due process wrapping does not transform a state law issue into a federal claim. Carson v. Dir. of the Iowa Dep't of Corr. Servs., 150 F.3d 973, 975 (8th Cir. 1998). "'[T]he Supreme Court has made it clear that the states define the elements of state offenses.'" Id. at 976 (quoting Johnson v. Rosemeyer, 117 F.3d 104, 110 (3d Cir. 1997)). There is no Constitutional reason why a state offense must include particular elements. Id.

This case presents a good example of why federal courts do not decide questions of state law in habeas proceedings. Cole's argument rests on the plain language of the statute, specifically the clause excepting receiving stolen property

with the intention of returning it to its rightful owner. Cole cited no Nebraska case defining the elements of the crime of theft by receipt of stolen property. The State explains that Nebraska law did require proof of fraudulent intent in earlier years. See, e.g., State v. Dinverno, 290 N.W.2d 203, 204 (Neb. 1980) (explaining elements of theft by receiving stolen property include receipt of the property, knowing it to be stolen, and intent to defraud the owner according to the 1943 statute); Goldsberry v. State, 92 N.W. 906, 907 (Neb. 1902) (including fraudulent intent as an element of the offense). Nebraska adopted the model penal code approach in 1977. The State argues that Nebraska law abandoned the fraudulent intent construction in favor of the guilty knowledge formulation in the model penal code. Under the guilty knowledge formulation, the defendant must know the property is stolen to have guilty knowledge. Recent Nebraska case law does speak in terms of guilty knowledge. State v. LaFreniere, 481 N.W.2d 412, 414 (Neb. 1992) (defining the central focus of the crime as the accused's knowledge or belief); State v. Nuss, 454 N.W.2d 482, 484 (Neb. 1990) (defining the element of intent as guilty knowledge); State v. Jones, 434 N.W.2d 333, 335-36 (Neb. 1989) (accused's admission the property was not his goes to the requisite guilty knowledge for the offense). Under the State's argument, the clause Cole relies on provides an affirmative defense for persons who receive or retain stolen property with the honorable intentions of returning it, but the clause does not form an element of the offense. See State v. Lopez, 787 P.2d 1261, 1264 (N.M. Ct. App. 1990) (holding under model penal code intent to restore stolen property to the owner is an affirmative defense). Like Cole, the State cites no Nebraska case stating the precise elements of theft by receiving stolen property.

Cole asserts counsel's failure to raise the fraudulent intent claim in state court was ineffective assistance. This issue is beyond the scope of the certificate of appealability. Cole has not moved to expand the certificate, thus we decline to consider whether any of Cole's numerous attorneys provided ineffective assistance.

Cole's petition does not present a debatable issue of federal law; thus, we affirm the district court's denial of habeas relief.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 02-1971

Frankie Levi Cole,

Appellant,

vs.

Frank X. Hopkins,

Appellee.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

February 21, 2003

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

BEST AVAILABLE COPY

FILED
DISTRICT COURT
NEBRASKA
03 FEB 13 AM 10:46
GARY D. MCFARLAND
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FRANKIE LEVI COLE,	)	
	)	
Petitioner,	)	4:99CV3327
	)	
vs.	)	MEMORANDUM AND ORDER
	)	
FRANK X. HOPKINS,	)	
	)	
Respondent.	)	

Before the court is filing no. 24, the "Motion to Dismiss" filed by the respondent, Frank X. Hopkins, former warden of the Nebraska State Penitentiary ("the State"). The State moves to dismiss filing no. 16, the pro se "First Amended Petition for Writ of Habeas Corpus" ("§ 2254 petition") filed by the petitioner, Frankie Levi Cole, an inmate at the Nebraska State Penitentiary.

28 U.S.C. § 2254 affords habeas corpus relief to "a person in custody pursuant to the judgment of a State court [who] is in custody in violation of the Constitution or laws ... of the United States." Id. § 2254(a). In his § 2254 petition, Cole initially alleged 17 grounds for habeas corpus relief. Of those 17 claims, previous orders of the court and filings by Cole have established that claims 3, 12, 14, 16 and 17 are no longer a part of this action (see filing nos. 17, 18, 19, 20 and 21). The State has moved to dismiss all remaining claims in the § 2254 petition on the grounds that Cole failed to exhaust[1] claims 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 13 and 15, and that those claims do not allege a violation of the

[1]To exhaust state remedies before filing a federal habeas petition, state prisoners must generally give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review process. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

Constitution or laws of the United States.

PREVIOUS PROCEEDINGS

Conviction and Sentence

On October 28, 1996, in the District Court of Douglas County, Nebraska, a jury found Cole guilty of the offenses of theft by receiving stolen property, in violation of Neb. Rev. Stat. § 28-517; and operating a motor vehicle to avoid arrest, in violation of Neb. Rev. Stat. § 28-905(2). On December 30, 1996, the Honorable Lawrence J. Corrigan, District Judge, after adjudging Cole an habitual criminal pursuant to Neb. Rev. Stat. § 29-2221, imposed a prison sentence of 15 years for theft by receiving stolen property and a consecutive prison term of 15 years for operating a motor vehicle to avoid arrest. (See filing no. 26, Certified Transcript in A-97-0007, Supplemental Transcript to Court of Appeals at 1-3, 17-18, 19-20.)

During his trial, Cole objected to the court's proposed jury instructions.[2] He also filed a pro se "Motion for Arrest of Judgment" (filing no. 26, Ex. 7 to Ex. 37). The trial court overruled Cole's objection and motion.

Direct Appeal

On direct appeal (Case No. A-97-0007), the Nebraska Court of Appeals affirmed Cole's conviction and sentence without opinion pursuant to Neb. Ct. R. of Prac. 7A(1) (summary disposition) on November 10, 1997 (filing no. 26, Ex. 30). The Nebraska Supreme Court denied further review on January 22, 1998 (filing no. 26, Ex. 29). In both the direct appeal and petition for further review, Cole's court-appointed appellate counsel

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[2]See the trial court's Instructions at filing no. 26, Certified Transcript in A-97-0007, Supplemental Transcript to Court of Appeals at 1 *et seq.*)

asserted the following trial court errors: (1) denial of Cole's motion for a continuance of trial; (2) conviction based on insufficient evidence; (3) denial of motion to dismiss at the close of the State's case; (4) denial of objection to a jury instruction; (5) denial of objection regarding inadequate foundation to support enhancement as an habitual criminal; and (6) imposition of an excessive sentence. (See filing no. 26, Exs. 4, 33, 35, 36.)

Cole filed pro se motions in the Nebraska Court of Appeals and the Nebraska Supreme Court for leave to submit a pro se brief so as to raise issues that he believed his court-appointed attorney improperly refused to address. Cole also raised those issues in various pro se filings including "Motion to Remand for Evidentiary Hearing on Ineffective Assistance of Counsel Issue," "Appellant's Response to Court-Appointed Counsel's Motion to Withdraw," motions relating to Cole's efforts to discharge his appointed appellate counsel and for appointment of substitute counsel, and a "Motion for Writ of Mandamus" in the Nebraska Supreme Court to require the Court of Appeals to entertain Cole's pro se brief. (See, e.g., filing no. 26, Exs. 21, 22, 26, 27, 34, 37 and items included within the Certified Transcript in A-97-0007)

State Post-conviction Proceedings

On April 29, 1998, Cole filed his "First Amended Verified Motion to Vacate and Set Aside Convictions" pursuant to Neb. Rev. Stat. §§ 29-3001 *et seq.* in the District Court of Douglas County, Nebraska, before the Honorable Lawrence J. Corrigan.[3] In his 1998 petition for post-conviction relief and his 1999 "Second Amended Verified Motion to Vacate

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[3]Cole had previously initiated a post-conviction action which the Douglas County District Court dismissed on October 31, 1997 because Cole's direct appeal was pending at that time. The Nebraska Court of Appeals (Case No. A-97-1155) affirmed the dismissal on April 2, 1998.

and Set Aside Convictions," Cole argued that fraudulent intent is an essential element of the offense of theft by receiving stolen property; that he received ineffective assistance of counsel at trial and on appeal; and that the prior convictions underlying the habitual criminal charge against him were void or voidable. (See filing no. 26, Certified Transcript in A-99-0068.) In a "Final Journal Entry" on January 7, 1999, the district court overruled Cole's post-conviction pleadings (id.).

In his appeal to the Nebraska Court of Appeals (Case No. A-99-0068) from the denial of post-conviction relief, Cole argued (filing no. 26, Exs. 3, 38) that: (1) Judge Corrigan abused his discretion by refusing to recuse himself despite an alleged conflict of interest (prior collusion with the prosecutor and defense counsel and denial of Cole's rights to a fair trial and due process); (2) Judge Corrigan erred by refusing to grant discovery and an evidentiary hearing in the post-conviction proceeding; and (3) Cole's attorneys rendered ineffective assistance of counsel by refusing to raise the issue that fraudulent intent is an essential element of the offense of theft by receiving stolen property.

During this appeal, Cole moved for leave to submit a supplemental brief. On July 6, 1999, the Court of Appeals denied Cole's motion to file a supplemental brief, but stated that Cole's supplemental issues would be considered by the court under the plain error standard of review. (See filing no. 26, Exs. 44, 45, 47.) On September 24, 1999, the Nebraska Court of Appeals, over Cole's objection, sustained the State's motion for summary affirmance pursuant to Neb. Ct. R. of Prac. 7B(2) ("A motion to affirm on the ground that the questions presented for review are so unsubstantial as not to require argument may be filed after the appellant's brief has been filed or the time for filing has expired...."). (See filing no. 26, Exs. 42, 48, 49.) On November 10, 1999, the Nebraska

Supreme Court denied further review (filing no. 26, Exs. 39, 40).

CURRENT HABEAS CORPUS PETITION

In his § 2254 petition, Cole asserts the following remaining claims:

Claim No. 1: **"Arbitrary and capricious manner in which the State used defective complaint to subvert mandatorily worded statutory preliminary hearing jurisdictional requirement" deprived petitioner of due process and/or equal protection.**

Claim No. 2: **"Denial of right to file a pro se direct appeal brief violated rights of Access to the Courts, a Fair Trial, Due Process, and/or Equal Protection of law."**

Claim No. 4: **"Erroneous denial by the Nebraska Appellate Courts of right to appeal 1998 Postconviction action violated rights to a Fair Trial, Due Process, and/or Equal Protection of the law...."**

Claim No. 5: **"State of Nebraska government officials' denial of records needed to perfect appeal of 1998 Postconviction action violated rights of Access to the Courts, a Fair Trial, Due Process, and/or Equal Protection of the law...."**

Claim No. 6: **"[Denial of] Effective Assistance of Direct Appeal Counsel [violated] Fifth, Sixth and Fourteenth Amendments to the Constitution of the U.S."**

Claim No. 7 **"[Denial of] Effective Assistance of Trial Counsel [violated] Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States."**

Claim No. 8: **"Denial of continuance prior to trial, or appointment of substitute counsel in light of attorney/client breakdown violated rights to Fair Trial and/or Due Process of Law."**

Claim No. 9: **"Arbitrary and capricious denial of requested jury instructions needed to prove theory of defense violated rights to a Fair Trial, Due Process, and/or Equal Protection of Law."**

Claim No. 10: **"Prior convictions not adequately authenticated to comport with Due Process and/or Equal Protection of Law in light of arbitrary or capricious manner in which mandatorily worded State law directives were not followed in this case."**

Claim No. 11: **"Insufficient evidence to support guilt under Section 28-517; e.g., fraudulent intent to deprive the owner not proved, and corpus delicti of crime not established."**

Claim No. 13: **"Arbitrary, capricious, and/or discriminatory use of discretion when**

applying mandatorily worded habitual criminal statute which eliminates prosecutorial or judicial discretion in its application, violated rights to Fair Trial, Due Process, and/or Equal Protection of Law."

Claim No. 15: **"By refusing to recuse himself, trial judge, Lawrence Corrigan (who Petitioner asserted within Postconviction complaint was complicit with defense attorneys and State Prosecutor in the course of the prosecution of the instant case) violated Petitioner's rights to a Fair Trial, Due Process, and/or Equal Protection of law, in the course of those Postconviction Proceedings as well."**

NEB. REV. STAT. § 28-517 - THE ISSUE OF FRAUDULENT INTENT

Claims 1, 2, 6, 7, 9 and 11 relate directly or indirectly to Cole's primary premise in this habeas corpus proceeding, namely, that the offense of theft by receiving stolen property requires the State to charge and to prove beyond a reasonable doubt the element of fraudulent intent. According to Cole, his preliminary hearing, the charging documents issued in the district court, and all proceedings thereafter were fundamentally defective for failure to charge and establish his fraudulent intent.

Cole relies on the language of Neb. Rev. Stat. § 28-517:

> A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, **unless the property is received, retained, or disposed with intention to restore it to the owner**.

(Emphasis added.)

Neb. Rev. Stat. § 29-1604 states, in pertinent part: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor...." See Ronzzo v. Sigler, 346 F.2d 565, 566 (8th Cir. 1965) (citation omitted): "A preliminary hearing in Nebraska is for the purpose of determining whether the offense charged has been committed and whether there is probable cause to believe the defendant committed it. It is ...'a procedural safeguard whereby it is assured to all accused

of crime that they will not be detained in custody without probable cause existing that the crime charged was committed by them.'" Thus, a preliminary hearing is required before an individual can be bound over to district court and before the district court acquires jurisdiction to issue an information charging the individual with a felony.

The alleged defect in Cole's preliminary hearing derives from what Cole refers to as the "exception clause" in Neb. Rev. Stat. § 28-517, i.e., the language: "unless the property is received, retained, or disposed with intention to restore it to the owner." Cole asserts that because the criminal complaint presented to the presiding judge at the preliminary hearing failed to allege any facts regarding Cole's fraudulent intent, the State failed to show probable cause that Cole had committed the charged offense. Therefore, Cole reasons that he should not have been bound over to district court and that the district court never obtained subject matter jurisdiction to file the information charging Cole with the felony offense of theft by receiving stolen property. Similarly, according to Cole, the district court lacked jurisdiction to try Cole on a defective information or to convict and sentence him, and, consequently, his convictions are void or voidable.

The State seeks dismissal of the foregoing claims on the ground that they have never been raised to the Nebraska appellate courts. See 28 U.S.C. §§ 2254(c) which provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." The State cites O'Sullivan v. Boerckel, 526 U.S. 838 (1999). However, in O'Sullivan, the Supreme Court explained that "[s]ection 2254(c) requires only that state prisoners give state courts a *fair* opportunity to act on their claims." Id. at 844 (emphasis in original). Comity requires

state prisoners to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." Id. at 845.

Cole presented, or attempted to present, his arguments regarding claims 1, 2, 6, 7, 9 and 11 to the trial court, the Nebraska Court of Appeals on direct appeal, the Nebraska Supreme Court, and in post-conviction proceedings. Cole satisfied the "fair presentation" requirement of O'Sullivan v. Boerckel by giving the state courts a fair opportunity to act on his claims regarding fraudulent intent at trial in his "Motion for Arrest of Judgment" (filing no. 26, Ex. 7 to Ex. 37), on appeal in the "Appellant's Response to Court-Appointed Counsel's Motion to Withdraw" (filing no. 26, Ex. 16), and to the Nebraska Supreme Court in his "Pro Se Memorandum Brief in Support of Motion for Writ of Mandamus" (filing no. 26, Ex. 34). In those filings, among others, Cole set forth the legal theory and supporting facts substantially equivalent to those he now asserts in claims 1, 2, 6, 7, 9 and 11 of his § 2254 petition.

However, while exhausted, claims 1, 2, 6, 7, 9 and 11 must be dismissed for failure to state a violation of the Constitution or laws of the United States. Cole misconstrues Neb. Rev. Stat. § 28-517 and the applicable law.

Fraudulent Intent

At one time, fraudulent intent did constitute an element of the offense of receiving certain stolen property. See, e.g., Norton v. State, 230 N.W. 438 (Neb. 1930). The element of fraudulent intent derived from the statutory language which, at that time, stated:

> **Whoever** steals any sow, barrow, boar or pig of any value, or **receives** or buys **any sow, barrow, boar, stag or pig that shall have been stolen, knowing the same to have been stolen, with intent by such receiving or**

> **buying to defraud the owner,** or conceals any such thief, knowing him to be such, or conceals any sow, barrow, boar or pig, knowing the same to have been stolen, shall be imprisoned in the penitentiary not more than five nor less than one year and shall pay the costs of prosecution."

Id. at 439, *quoting* section 9611, Comp. St. 1922 (emphasis added). See also Ex parte Sullivan, 121 N.W. 456 (Neb. 1909), construing an earlier statutory version of receiving stolen property as applied to a "charge of buying and receiving stolen horses, which had been stolen in the state of South Dakota, knowing them to have been stolen, **and with the intent to defraud the owners.**" Id. at 547 (emphasis added). As explained by the court: "What the Legislature sought to prevent was the trade and commerce in stolen goods in this state. It had the right to make it a crime to receive goods of this character with the intent to defraud the owner, and this is the gist of the offense. It is immaterial that the owner may reside in another state." Id. at 458. The version of the offense in effect in 1883 in Nebraska is set forth in Levi v. State, 14 N.W. 543 (Neb. 1883), as follows: "Section 116 of the Criminal Code provides that 'if any person shall receive or buy any goods or chattels, of the value of $35 or upwards, that shall be stolen or taken by robbers **with intent to defraud the owner**, ... every person so offending shall be imprisoned in the penitentiary not more than seven years, nor less than one year.'" Id. at 543 (emphasis added).

Eventually, however, the Nebraska Legislature dropped the requirement of fraudulent intent as an element of the statutory offense. Instead, a conviction for violation of Neb. Rev. Stat. § 28-517 defines guilty knowledge as the requisite mental state for the offense of receiving stolen property, rather than fraudulent intent. See, e.g., State v. Bewley, 1999 WL 14506 (Neb. App. Jan. 12, 1999):

> The statute at issue provides that a person commits theft if he receives, retains, or disposes of stolen movable property of another, knowing that it has been stolen or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner. § 28-517.
>
> To "knowingly" commit theft under § 28-517, the defendant must have (1) actually known the property was stolen, (2) known facts which would lead a reasonably prudent person to believe that the property was stolen, or (3) been willfully blind to facts showing that the property was stolen.

Furthermore, circumstantial evidence giving rise to an inference of such guilty knowledge can include "abandonment of the [vehicle] after being approached by [a] deputy" or "the fact that a defendant is found hiding near a stolen vehicle just after a chase involving the police and that vehicle." State v. Bewley, 1999 WL 14506 at *3-4 (citation omitted).[4]

Burden of Proving Intent to Restore

In addition, a defendant's intent to restore the property to the owner is in the nature of a defense to a charge of receiving stolen property. Absent evidence presented in support of that defense, the prosecution has no burden to prove that a defendant lacked intent to return the property to the owner.

Neb. Rev. Stat. § 28-517 is based on the Model Penal Code ("MPC") § 223.6. State v. Nuss, 454 N.W.2d 482, 483-84 (Neb. 1990). MPC § 223.6, subsection 1, contains the same language as Neb. Rev. Stat. § 28-517, i.e.: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained,

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[4]Cole argues that if his conviction under Neb. Rev. Stat. §28-517 cannot stand, neither can the additional conviction for operating a motor vehicle to avoid arrest, Neb. Rev. Stat. § 28-905(2), which arose out of the same facts and events.

or disposed with intention to restore it to the owner."

Decisions involving the same statutory language as MPC § 223.6 and Neb. Rev. Stat. § 28-517 clarify that the burden of pointing to evidence in the record of a defendant's intent to restore stolen property to its owner (variously referred to as the "intent-to-return" or "innocent intent" defense) rests with a defendant, and without such evidence in the record, a prosecutor bears no burden to prove the absence of such intent. See, e.g. State v. Lopez, 787 P.2d 1261 (N.M. App. 1990), interpreting an identical statute also derived from the Model Penal Code § 223.6.

The court in Lopez explained the operation of the statutory "intent-to-return" clause. In that case, the defendant offered evidence that at all relevant times, he intended to return the stolen property to its owner in exchange for a reward. Thus, the defendant proposed the following jury instruction:

> Evidence has been presented that the defendant received, retained or disposed of the property with the intent to return it to its owner. The presence of such an intent is a defense to the charge of receiving stolen property. The burden is upon the State to prove beyond a reasonable doubt that this defense of intent to return the property to its owner does not apply.
>
> If you find that the defendant did intend to return the property to its owner then you must find defendant not guilty.

Id. at 1263.

On appeal, the court in Lopez reversed the defendant's conviction because of the trial court's refusal to give the defendant's instruction. The appellate court declared: "[W]e hold that defendant's proposed instruction correctly states the prosecution's burden of proof. Defendant's sole burden was to point to evidence raising a reasonable doubt that his actions were protected by the intent-to-return defense. In other words, the state had

the burden of negating the defense beyond a reasonable doubt. Our statute is similar to a Model Penal Code provision whose drafters assumed that the burden would be so allocated." Id. at 1264.

However, the state has the burden to negate the intent-to-return defense *only if* evidence has been presented in support of the defense. Id. "We point out, however, that the district court must instruct on the defense only if it is raised by the defendant and only if, on the basis of the evidence at trial (whether offered by the state or by the defendant), a reasonable juror could have a reasonable doubt arising from the defense." Id. "Of course, for the intent-to-return defense to apply, the stolen goods should never have been held for any purpose other than to return the goods to the owner." Id. at 1265. See also State v. Orosco, 833 P.2d 1155 (N.M. App. 1991), aff'd, 833 P.2d 1146 (N.M. 1992), citing Lopez for the principle that "[i]t is not at all uncommon for the state to be required to prove certain facts beyond a reasonable doubt only when the matter is raised by the defendant. See, e.g., ... *State v. Lopez*, 109 N.M. 578, 787 P.2d 1261 (Ct. App.1990) (intent-to-return defense to charge of receiving stolen property) ...." Id. at 1167 (Hartz, J. concurring).

Similarly, in People v. Dishman, 180 Cal. Rptr. 467 (Cal. App. 1982), the appellate court explained the defense of "innocent intent," as follows:

> [I]f a defendant receives stolen property with an intention to return it to the true owner, that is a matter of defense upon which he would have the right to introduce evidence and which, if received, allows the issue of such intent to be dealt with by a proper instruction ....
>
> The People, in proving the commission of the crime, have the primary obligation to establish, by substantial evidence (1) that the particular property was stolen, (2) that the accused received, concealed or withheld it from the owner thereof, and (3) that the accused knew the property was stolen ....
>
> The burden of proving each of these elements, whether by direct or

> circumstantial evidence, is upon the district attorney. The burden of proving innocent intent is upon a defendant. In putting forth such defense, the critical factor is the intent of the receiver at the moment that he receives the stolen property. In other words, if a prima facie case is made out by the state by showing that the property was stolen, that it was received, concealed, or withheld from the owner and that the accused knew the property was stolen, he is subject to conviction, so long as the jury finds that he had the requisite general criminal intent. A defense that although all other elements were present, the defendant did not have any criminal intent but had, from the moment that he received the stolen property, intended to return it to the rightful owner, if proven and accepted by the jury, will absolve him of guilt (2 Burdick, Law of Crime, p. 450).

Id. at 469-470.

Cole cites Godwin v. United States, 687 F.585 (2d Cir. 1982), in support of his argument that the State had to disprove the "exception clause" in Neb. Rev. Stat. § 28-517 (i.e., "unless the property is received, retained, or disposed with intention to restore it to the owner") to sustain the charge of theft by receiving stolen property. According to Cole, the "exception clause" in section 28-517 functions as the equivalent of intent to deprive another of property, which is an element of other theft crimes such as theft by unlawful taking. Cole urges that the State's failure to charge and prove that Cole was not within the "exception" for property received with intent to return it to the owner renders his conviction void or voidable.

Godwin involved a collateral attack on a conviction based on a guilty plea. Fed. R. Crim. P. 11 requires that a defendant understand the charge and that a factual basis for the guilty plea exists. In Godwin's case, the court failed to explain during the plea hearing the requisite state of mind for the crime of receiving stolen property and failed to inquire further when Godwin expressed a state of mind inconsistent with the offense.

Godwin stated at his plea hearing that he did not intend to sell the stolen property,

but rather intended to return the property in order to collect a reward. Id. at 587. He thereby in effect denied the crime to which he was pleading, because "the federal offense of receiving stolen property ... incorporates the common law exception for possession with the purpose of restoring stolen property to the owner. And the exception applies when the purpose of restoring the property is accompanied by an expectation of a reward, provided the reward has been announced or is believed to have been announced before the property is possessed or agreed to be possessed." Id. at 589. See also United States v. Calkins, 906 F.2d 1240, 1246 (8th Cir. 1990), citing Godwin:

> The common law exception to the federal offense of receiving stolen property provides that an individual is not guilty of the offense if the purpose of possession is to restore the stolen property to its owner. *Godwin v. United States*, 687 F.2d 585, 588 (2d Cir. 1982). This exception applies when the purpose of restoring property is accompanied by an expectation of a reward, provided the reward has been announced or believed to have been announced before the property is possessed or agreed to be possessed. *Id.*

Cole relies on the following language from Godwin:

> The common law definition of theft includes an intent to deprive the owner of his property, see Model Penal Code, § 223.2(1). In codifying the common law crime of receiving stolen property, the Model Penal Code recasts the element of intent to deprive an owner of his property into an exception so that the offense is established by knowing possession of stolen property "unless the property is received, retained, or disposed with purpose to restore it to the owner." *Id.* § 223.6(1). At common law possession with a purpose of restoring stolen property to its owner was not unlawful when a reward was sought, provided the reward was announced before the possession occurred and, of course, provided that the person claiming the reward had nothing to do with the theft.

Id. at 588.

Based on this language, Cole reasons that to prove a charge of theft by receiving property, the State must establish the absence of a defendant's intent to restore property

to the owner in the same fashion that the State must establish intent to deprive the owner of property to prove other kinds of theft. However, that is not what Godwin states. The decision in Godwin demonstrates the principle that a defendant may not plead guilty to the offense of receiving or conspiring to receive stolen property while at the same time maintaining that he intended at all times to return the property to its owner. The decision does *not* establish the principle for which Cole relies on it, namely, that even when no evidence, allegation or even hint of intent to return stolen property exists, a prosecutor must nonetheless prove beyond a reasonable doubt the absence of such intent.

Cole, did not testify, offer evidence of any kind, or even allege at any time that he intended to return the stolen vehicle to its owner. The record is wholly devoid of any evidence to suggest that Cole maintained such intent. As a result, the State had no burden at any stage of the proceedings to charge or prove the absence of intent to return the property.

Both of Cole's theories are erroneous, i.e., (1) that fraudulent intent is an element of Neb. Rev. Stat. § 28-517 and (2) that the State, in order to obtain a conviction under 28-517, had to charge and prove that Cole lacked intent to return the stolen vehicle to its owner. Claims 1, 2, 6, 7, 9 and 11 of Cole's § 2254 petition will be dismissed with prejudice.

ALLEGED ERRORS IN POSTCONVICTION PROCEEDINGS

Claims 4, 5 and 15 allege errors during Cole's state post-conviction proceedings in the state district court and on appeal. The claims relating to Cole's state post-conviction proceedings are not cognizable in a federal habeas corpus proceeding. See Gee v. Groose, 110 F.3d 1346, 1351-52 (8th Cir. 1997), *citing* Jolly v. Gammon, 28 F.3d 51 (8th

Cir.), cert. denied, 513 U.S. 983 (1994), *quoting* Williams-Bey v. Trickey, 894 F.2d 314, 317 (8th Cir.1990)): "[A]n infirmity in a state post-conviction proceeding does not raise a constitutional issue cognizable in a federal habeas petition." In addition, in Coleman v. Thompson, 501 U.S. 722, 752 (1991), the United States Supreme Court ruled that because there is no constitutional right to an attorney in state post-conviction proceedings, a petitioner cannot base a federal habeas corpus claim on a deprivation of effective assistance of counsel in state post-conviction proceedings.

DENIAL OF CONTINUANCE, SUBSTITUTE COUNSEL

In claim 8, Cole asserts that the district court's refusal to grant a continuance one week before trial and to appoint substitute counsel violated Cole's rights to due process and a fair trial. On direct appeal (Case No. A-97-0007) to the Nebraska Court of Appeals and in the Petition for Further Review to the Nebraska Supreme Court, Cole's court-appointed appellate attorney assigned as error the district court's denial of trial counsel's request for a continuance (filing no. 26, Exs. 4, 33, 36). Appellate counsel pointed out the protests by Cole's appointed trial attorney that six days was an insufficient period for counsel to prepare for trial.

However, the record reveals that Cole fought passionately with all of his court-appointed attorneys in the district and appellate courts. Cole's dissatisfaction with his attorneys stemmed from their refusal to assert Cole's theory that the State must charge and prove fraudulent intent as an essential element of Neb. Rev. Stat. § 28-517. The record clearly indicates that no continuance or substitute counsel would have solved the attorney/client breakdown of which Cole complains unless eventually an attorney could be found who shared Cole's heartfelt adherence to his interpretation of Neb. Rev. Stat. § 28-

517. As the State argues, the district judge acted within his discretion in deciding not to grant a continuance and in declining to appoint a fourth successive attorney to represent Cole in the district court. The Bill of Exceptions evidences the court's efforts to accommodate Cole without success. The record establishes no abuse of discretion, deprivation of due process or denial of a fair trial.

HABITUAL CRIMINAL CHARGE - PROSECUTORIAL DISCRETION

In claim 13, Cole maintains that in retaliation for his refusal to enter a guilty plea, the prosecutor sought, and obtained, leave to amend the Information to include an habitual criminal charge. According to Cole, Nebraska prosecutors "routinely" forego use of the habitual criminal statute for defendants who meet the statutory definition of habitual criminals but who plead guilty to substantive offenses and give up their right to a trial. Construing claim 13 liberally, Cole contends that the trial court deprived him of equal protection and due process by allowing the prosecutor to charge Cole as an habitual criminal.

Cole raised this issue in the district court at ¶¶ 1.32-1.34 of his "Second Amended Verified Motion to Vacate and Set Aside Convictions" and in a "Brief of Supplemental Arguments in Opposition to Appellee's Motion for Summary Affirmance" on appeal from denial of post-conviction relief. (See filing no. 26, Certified Transcript in A-99-0068.) However, whether or not exhausted, Cole's equal protection and due process challenges to implementation of the Nebraska habitual criminal statute must be denied on the merits. These kinds of challenges to the use of habitual criminal charges have repeatedly been rejected. See, e.g., United States v. Goodwin, 457 U.S. 368, 376-77(1982), *citing* Bordenkircher v. Hayes, 434 U.S. 357, 364(1978):

> In Bordenkircher v. Hayes, 434 U.S. 357... the Court held that the Due Process Clause of the Fourteenth Amendment did not prohibit a prosecutor from carrying out a threat, made during plea negotiations, to bring additional charges against an accused who refused to plead guilty to the offense with which he was originally charged. The prosecutor in that case had explicitly told the defendant that if he did not plead guilty and "save the court the inconvenience and necessity of a trial" he would return to the grand jury to obtain an additional charge that would significantly increase the defendant's potential punishment.[9] The defendant refused to plead guilty and the prosecutor obtained the indictment. It was not disputed that the additional charge was justified by the evidence, that the prosecutor was in possession of this evidence at the time the original indictment was obtained, and that the prosecutor sought the additional charge because of the accused's refusal to plead guilty to the original charge.
>
> > FN9. The prosecutor advised the defendant that he would obtain an indictment under the Kentucky Habitual Criminal Act, which would subject the accused to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Absent the additional indictment, the defendant was subject to a punishment of 2 to 10 years in prison.

In Bordenkircher, 434 U.S. 357, 364 (1978), the Supreme Court stated: "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was (not) deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' " Accord United States v. Armstrong, 517 U.S. 456 (1996); Luna v. Black, 772 F.2d 448, 449-50 (8th Cir. 1985).

In light of the foregoing principles, Cole's challenge to Nebraska's habitual criminal

statute is without merit. The phrasing of Neb. Rev. Stat. § 29-2221 (use of the word "shall") does not abolish prosecutorial discretion to decide what charges to bring or invalidate the prosecution's use of an habitual criminal charge as leverage in the context of plea-bargaining.

HABITUAL CRIMINAL CHARGE - EVIDENCE

In claim 10, Cole contends that in his enhancement hearing under the habitual criminal statute, the State presented records of Cole's prior convictions in the form of exhibits which did not comply with Neb. Rev. Stat. §§ 27-902 and 29-2222, because the exhibits were not properly authenticated. Cole's attorney, on direct appeal and in a petition for further review, presented claim 10 to the Nebraska Court of Appeals and the Nebraska Supreme Court as an evidentiary error and did not claim that Judge Corrigan's admission of the exhibits violated Cole's due process rights by denying Cole a fundamentally fair trial. There has been no exhaustion of the due process issue, and in any event, Cole does not allege, and nothing in the record suggests, that Cole denied his prior convictions or that he was not the same person described in the exhibits offered by the State to prove the prior convictions.

Neb. Rev. Stat. § 29-2222 states: "At the hearing of any person charged with being a habitual criminal, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for any of such crimes formerly committed by the party so charged, shall be competent and prima facie evidence of such former judgment and commitment." However, in State v. Lomack, 545 N.W.2d 455, 469 (Neb. App. 1996), the Nebraska Court of Appeals held that substantial compliance with the statute may suffice: "In *State v. Bundy*, 181 Neb. 160, 147 N.W.2d

500 (1966), *cert. denied*, 389 U.S. 871... (1967), the court held that § 29-2222 does not confine the proof on the issue of the defendant's prior convictions to the documents therein mentioned. Moreover, in *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987), the court found that certified copies of the sheriff's return and warden's receipt showing the defendant's actual commitments were in substantial compliance with the requirement of proof of commitment. We therefore find that the trial court did not err in finding that Lomack was a habitual criminal."

The sufficiency of evidence offered to prove Cole's prior convictions is essentially an issue of state law. Federal courts can grant habeas corpus relief under § 2254 only when there has been a violation of federal statutory or constitutional law. To the extent that Cole challenges the sufficiency of evidence under state law, he is not entitled to habeas review, and that part of claim 10 will be dismissed with prejudice.

On the other hand, insofar as Cole raises a due process issue or challenges the constitutionality of his prior convictions, Cole has not exhausted those claims. See generally, Bounds v. Delo, 151 F.3d 1116, 1119 (8th Cir. 1998): "A state court's evidentiary rulings can form the basis for federal habeas relief under the due process clause only when they were so conspicuously prejudicial or of such magnitude as to fatally infect the trial and deprive the defendant of due process." (Citations omitted.)

Cole, anticipating this court's ruling that constitutional issues regarding evidence of, and defects in, his prior convictions have not been fairly presented to the state courts, contends that any failure to demonstrate a constitutional violation derived from the ineffective assistance of his trial counsel and attorney on direct appeal. See generally Strickland v. Washington, 466 U.S. 668 (1984). However, regarding allegations of

ineffective assistance of counsel, the Supreme Court has instructed that there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689-90:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable .... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

466 U.S. at 689.

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

466 U.S. at 690.

Cole bears the burden of proving his attorney's deficient performance and any resulting prejudice. To establish prejudice, Cole must demonstrate that absent counsel's errors, there exists a reasonable probability that the result of the proceeding would have been different. Parker v. Kemna, 260 F.3d 852, 854 (8th Cir.), cert. denied, 122 S.Ct. 657

(2001). Cole has borne neither burden on the record before this court. However, that part of claim 10 in which Cole alleges constitutional violations in connection with evidence of, and defects in, his prior convictions will be dismissed without prejudice so that Cole may fairly present, or attempt to present, those issues to the Nebraska state courts.

Insofar as the State moves to dismiss Cole's § 2254 petition for failure to exhaust state court remedies, the motion is denied except as to the part of claim 10 in which Cole alleges constitutional violations in connection with evidence of, and defects in, his prior convictions. The remaining claims before this court, i.e., the part of claim 10 which presents an evidentiary issue and all of claims 1, 2, 4, 5, 6, 7, 8, 9, 11, 13 and 15, will be dismissed on the alternate ground asserted by the State, namely, failure to state a violation of the Constitution or laws of the United States cognizable in a federal habeas corpus proceeding.

THEREFORE, IT IS ORDERED:

(1) That filing no. 24, the "Motion to Dismiss" filed by the respondent, Frank X. Hopkins, is granted; and

(2) That a separate judgment dismissing the above-entitled action will be filed in accordance with this Memorandum and Order.

DATED this 13th day of February, 2002.

BY THE COURT:

RICHARD G. KOPF
Chief District Judge